Supreme Court, U.S.
FILED

JUL 13 2010

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No. 10- 10-93

IN THE

Supreme Court of the United States

STALLION, INC.,

Petitioner,

v.

JOHN GALLIANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States, in order to protect fundamental due process rights of notice and opportunity to be heard, requires foreign language pleadings to be translated into English when served in the United States pursuant to the Hague Convention.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Stallion, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is not yet reported, but is published at 2010 WL 2265022, as well as at 2010 N.Y. Slip Op. 04829, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-8a. The opinion of the New York State Supreme Court, Appellate Division, First Department is reported at 62 A.D.3d 415, 879 N.Y.S.2d 400 (1st Dept. 2009), and is reprinted at Pet. App. 9a-12a. The opinion of the Supreme Court of the State of New York, County of New York is reported at 19 Misc.3d 1108(A), 859 N.Y.S.2d 903 (Sup.Ct., N.Y. Co. 2008), and is reprinted at Pet. App. 13a-21a.

JURISDICTION

The opinion of the New York State Court of Appeals was decided on June 8, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.

TREATIES, CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, Article 5

> The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –
>
> (a) by a method prescribed by its internal law for the service of documents in domestic

actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

> The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered . . .

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Civil Practice Law and Rules §5304(a)(2)

(a) No recognition. A foreign country judgment is not conclusive if:

* * * * *

2. the foreign court did not have personal jurisdiction over the defendant.

New York Civil Practice Law and Rules §5305(a)(3)

(a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

* * * * *

3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.

PRELIMINARY STATEMENT

Plaintiff-Respondent John Galliano, S.A. seeks recognition of a default judgment issued in a French action in which Defendant-Petitioner Stallion, Inc. contends it did not receive "notice reasonably calculated to apprise" it of the pendency of that foreign proceeding because the French writs served upon it in the United States were not translated into English, even though (a) the United States mandates translation for service under the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (the "Hague Convention"), (b) French law also requires that all writs served on defendants in the United States be served together with English translations, and (c) principles of comity require an English translation since French law requires that foreign pleadings served on French nationals in France be translated into French.

Recognizing a foreign judgment under these circumstances in the absence of any reasonable notice to Stallion would run afoul of fundamental principles of constitutional due process, set aside an important procedural safeguard on Hague Convention service, and establish a dangerous precedent for disputes involving United States companies doing business abroad. Such recognition would also run afoul of established precedents in federal and state courts nationwide.

The decision below has been described by at least one noted commentator, David D. Siegel, in his New York State Law Digest as "the most interesting ground argued by defendant . . . [which the Court] doesn't make much of." Professor Siegel also recognized that enforcing this default judgment depended on comity.

Here, notably, French courts require that foreign pleadings be translated into French when served on French Nationals in France pursuant to the Hague Convention.

For the foregoing reasons, the judgments of the trial and appellate courts must be reversed and Respondent's motion for summary judgment in lieu of complaint denied.

STATEMENT OF THE CASE

A. United States' Requirement for Translation of Documents Served Under the Hague Convention

This petition requests review of the enforceability of a French default judgment against a New York corporation based upon the service in New York of foreign language pleadings in violation of (a) the United States requirement, under the Hague Convention, that such pleadings be translated into English, (b) the French requirement, under the rules of the Paris Prosecutor's Office, that all writs served on defendants in the United States be accompanied by English translations, and (c) the principles of the comity, since French law requires that foreign pleadings served on French nationals in France be translated into French.

Article 2 of the Hague Convention requires that each Member State designate a "Central Authority" to receive requests for service from other Member States. The United States designated the Department of Justice ("DOJ") as its Central Authority.

Article 5 of the Hague Convention, which govern the administration of service of foreign pleadings, require *inter alia* that whenever service of process is not accepted voluntarily, a Member State's Central Authority shall arrange to have process served "by a method prescribed

by its internal law for the service of documents in domestic actions . . ." If the document is so served, "the Central Authority may require the document served to be written in, or translated into, the official language or one of the official languages of the State addressed."

In July 2003, the Permanent Bureau of the Hague Conference on Private International Law ("HCCH"), which has "primary responsibility for administrative issues" regarding the Hague Convention, solicited responses from Member States to its questionnaire to update its 1992 handbook regarding service of pleadings abroad and to redesign the Hague Conference's website. Each Member State was asked to "specify the extent and scope of requirements for translation, if any (translation of documents to be served, translation of document's summary, translation of evidence to be served, etc.).

In October 2003, DOJ - acting in its capacity as the United States Central Authority - submitted a twelve-page response to the Questionnaire, advising that it had outsourced formal service requirements to a private contractor, Process Forwarding International ("PFI"), and that:

> "[A]ll formal requests for the service of documents made pursuant to Article 5(1) and submitted to Process Forwarding International must be translated into English, *along with a translation of the underlying documents*." (102-103, 115) (emphasis supplied).

B. Applicability of the Hague Convention In This Case

The default judgment was based upon a license agreement entered into in February 1998 between Respondent's predecessor-in-interest and Stallion, entered into and performed in New York. All dealings between the parties were conducted in English since the principals and employees of Stallion do not speak or read French. Respondent's predecessor-in-interest, Les Jardins D'Avron, maintained an office in the City of New York and engaged in business there. Respondent John Galliano, S.A. is a French company which was substituted in place for Les Jardins in the license, which covered the use of the "John Galliano" trademark for the production and distribution of luxury apparel, particularly fur garments, in the United States market.

Although the License provided that disputes between the parties would be submitted to the French courts, the performance of the License was based in the United States, the territory of the License was limited to the domestic market of the United States and the two trademarks covered by the License were United States trademarks. Under the terms of the License, the products were required to be produced solely in Stallion's plant in New York, with a "Made in the USA" label to be included "subject to compliance with applicable United States law". The promotion minimum and the minimum annual guaranteed royalty under the License was set in United States dollars. The currency of the royalties was to be in United States dollars. The agreement also contemplated visits by John Galliano of Les Jardins to the United States, requiring Stallion to

hire a bodyguard to protect Mr. Galliano during such visits. The License agreement was negotiated in English and reduced to written form in English.

C. Dispute Between Stallion and Galliano

In 2001, Petitioner accused Stallion of not performing its obligations under the License and claimed outstanding royalties in the amount of $187,500.00. In turn, Stallion demanded payment of $89,067.26 for goods, wares, and merchandise that Stallion sold and delivered to Les Jardins between March 19, 1998 and March 28, 2000. Throughout November and December 2001, the two parties participated in settlement negotiations through their counsel - in English - attempting to resolve their dispute, but failed to reach agreement.

D. The French Action and the Default Judgment

Sometime in 2002, Galliano commenced an action in Paris, France, to recover moneys allegedly due from Stallion. Over a period of sixteen months, from December 16, 2002 through March 16, 2004, three "writs" (the French equivalent of a complaint) were purportedly delivered to Stallion's office and left with its support staff. None of the writs were translated into English. The first writ was rejected by the French court and the second writ was withdrawn by Galliano due to its own error. After Stallion did not appear and defend itself in the French proceeding, the French court issued a default judgment based on the third writ against Stallion in the amount of $335,297.

E. Galliano Moves to Enforce the French Default Judgment in New York

Three years later, on July 5, 2007, Petitioner commenced the present action to enforce the French default judgment by service of a summons with motion for summary judgment in lieu of complaint pursuant to §3213 of New York's Civil Practice Law and Rules. The French judgment, now with an English translation, was submitted in support of the motion. The affidavit of service of the first writ states that it was served upon "Rita (receptionist)"; the affidavit of service of the second writ states that it was served upon "Fran Cannara as legal clerk"; and the affidavit of service of the third writ, on which the default judgment was based, states that on March 16, 2004 "documents from France" were served upon Stallion by ". . . presenting to and leaving the same with Fran Cannara – executive secretary".

In opposition to the motion, Stallion contended *inter alia* that the mere delivery of the French language documents, in violation of the translation requirement adopted by DOJ, did not constitute proper service under the Hague Convention and deprived the French Court of personal jurisdiction over Stallion. Stallion's president submitted an affidavit in which he stated that neither he nor Fran Cannara read or speak French, and that Ms. Cannara was not an officer of Stallion, that she had no authority to act on its behalf, and that she was employed as support staff in Stallion's fur storage area.

F. The Lower Court Grants Galliano Summary Judgment in Lieu of Complaint

In its decision granting summary judgment, the lower court rejected Stallion's proof of the DOJ translation requirement, which included excerpts of the DOJ Questionnaire Response on the HCCH website and relevant portions of the actual DOJ Questionnaire Response.

Stallion moved to renew and reargue, submitting correspondence from the First Secretary of the Permanent Bureau, who confirmed receipt of the official U.S. response to the Questionnaire, and noted that the U.S. response could be accessed on the HCCH website (*www.hcch.net*), which contained copies of all official responses made by members of the HCCH to the Questionnaire. Stallion noted that references to the DOJ's translation requirement were also included in the official "Practical Handbook on the Operation of the Hague Service Convention" published by the HCCH (the "Hague Convention Handbook"). In its Response to the Questionnaire, DOJ also stated that, in providing updated country-by-country information relating to the Convention's operation, it would consider it useful for the website to include translation requirements.

The Hague Convention Handbook referred the reader to the HCCH website (cited in Stallion's opposition to summary judgment) to determine whether or not a Member State requires translation, and noted that a large number of States which responded to the Questionnaire required a translation of documents to be served.

Stallion also established (through documents obtained in a FOIA request) that the DOJ's English translation requirement is evidenced in diplomatic communiqués by both DOJ and the United States Department of State. For instance, in its May 7, 2003 Communiqué to the Organization of American States, DOJ provided notice of its translation requirement and its designation of PFI as process server with respect to service of process under the Inter-American Convention on Letters Rogatory and the Hague Convention. The communiqué stated in part that:

> Beginning June 1, 2003 requests [for service of process] should be transmitted to Process Forwarding International. Requests for service must be transmitted in duplicate and *with an appropriate translation of documents to be served.* (emphasis supplied).

Additionally, a "Circular Note" from Secretary of State Colin L. Powell dated June 4, 2003 "on provision of certain judicial assistance" informed foreign diplomats "of certain changes to the way judicial assistance is afforded . . . to litigants before [foreign] tribunals by the Government of the United States". The Note stated that:

> The purpose of this circular diplomatic note is to announce *a change* in how requests . . . for service of process in civil and commercial matters will be handled in the United States. This change will affect countries party to the Hague Convention . . . and the Inter-American Convention on Letters Rogatory and Additional Protocol.

* * *

> Beginning in June 1, 2003, request for service of process should be transmitted to Process Forwarding International. *Requests for service must be transmitted in duplicate with an appropriate translation.* (*Id.*) (emphasis supplied).

On September 24, 2008, the lower court denied reargument and renewal, dismissing, out of hand, Stallion's documentary evidence establishing DOJ's translation requirement as "merely an advisory draft by a Department of Justice employee". In so doing, the trial court apparently overlooked the formal DOJ Questionnaire Response submitted as an exhibit to Stallion's opposition papers and instead mistakenly referred to a draft of the DOJ response, which was also included as part of the same exhibit.

G. New York's Appellate Division Upholds the Lower Court's Decision

New York's Appellate Division, First Department reversed the lower court's denial of Stallion's motion to renew, finding that renewal should have been granted to consider the documents that defendant obtained from DOJ via its FOIA request. However, the Appellate Division nonetheless upheld the lower court's grant of summary judgment on the basis of §5305(a)(3) of New York's Civil Practice Law and Rules, a provision neither mentioned by any of the parties nor relied on by the lower court. In particular, the appellate court ruled that:

> It is true that CPLR §5304 (a) (2) declares a foreign country judgment to be not conclusive if the foreign court never had personal jurisdiction over the defendant. However, CPLR §5305 (a) (3) states that a foreign country judgment should not be refused recognition for lack of personal jurisdiction if "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the matter involved." Prior to commencement of the French proceedings, defendant entered into a contract in which it agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction under CPLR §5305 (a) (3). *Id.*

H. After Granting Leave to Appeal, New York's Court of Appeals Affirms

The New York State Court of Appeals agreed with Stallion's contention on appeal, and stated that

> [I]f recognition of a foreign money judgment were sought in New York and the defendant had received no meaningful notice of the foreign proceeding, that lack of notice would serve as a legitimate basis for not enforcing the judgment in our State, as the entry of such a judgment would not comport with our conception of personal jurisdiction or our notion of fairness. Pet. App. 5a.

However, the Court of Appeals thereafter held that under the Hague Convention, it was for "the Paris Commercial Court to consider whether service on Stallion was properly made." Pet. App. 7a. The Court then gave wide deference to the French court, finding that

> "[g]iven that the Paris Commercial Court entered a judgment in Galliano's favor in Stallion's absence, it would seem clear that it was 'established' to that court's satisfaction that [the Hague Convention's] requirements were met." Pet. App. 7a.

The Court then summarily found, without explanation, that

> [W]e are satisfied that Stallion had notice of the proceeding in France 'in sufficient time to enable [it] to defend' itself in that action..., and the Paris Commercial Court's exercise of personal jurisdiction over Stallion under these circumstances was not unfair...because the French court's money judgment in favor of Galliano does not run afoul of our conception of personal jurisdiction or our notion of fairness . . . Pet. App. 8a

Thus, the Court of Appeals made it possible for Respondent and other foreign entities to ignore the requirement of DOJ as Central Authority under the Hague Convention, as well as from the United States Department of State, that "[r]equests for service must be transmitted in duplicate with an appropriate translation."

REASONS FOR GRANTING THE PETITION

This case presents the fundamental question whether United States Constitution's requirements of fair play and substantial justice, as embodied in the Due Process clause of the Fifth and Fourteenth Amendments via the DOJ's requirements as Central Authority to the Hague Convention, may be side-stepped by a foreign entity in seeking a default judgment in a foreign court over a United States company doing business exclusively in the United States. The answer to that question is of paramount importance to United States companies doing business abroad especially given the foreign entity's requirement that United States pleadings served in the foreign entity's country be translated into that country's native language.

Although the Court of Appeals noted that Stallion had entered into a contract in which it agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction, the Court failed to recognize the inherent dichotomy in the concept of personal jurisdiction between (a) the power of the French court to bring Stallion in so that it could hear and decide the dispute, and (b) effecting personal service of process upon that United States defendant.

This very Court has held that, "personal jurisdiction in a given dispute is conditioned on both a court's ability to assert jurisdiction over a defendant *and* defendant's receipt of notice and opportunity to be heard." *Employers Ins. of Wausau v. Banco De Seguros Del Estrado*, 199 F.3d 937, 943 (7th Cir. 1999) (*citing Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985)) (emphasis supplied); *Flexi-Van Leasing, Inc. v. Gulf Fleet Marine Corp.*, 108 F.R.D. 116 (S.D.N.Y. 1985) (distinguishing between personal jurisdiction and service of process, and noting that "although related, these two concepts are distinct").

As the Court of Appeals for the Ninth Circuit explained recently:

> The familiar 'minimum contacts' test, coupled with statutory authorization, provides *a basis* for an exercise of jurisdiction, but service of process is the *mechanism* by which the court actually acquires the power to enforce a judgment against the defendant's person or property. In other words, service of process is the means by which a court asserts its jurisdiction over the person. Service of process has its own due process component, and must be 'notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . Without a proper basis for jurisdiction, or in the absence of proper service of process, the district court has no power to render any judgment against the defendant's person or property unless the defendant has consented to jurisdiction or waived the lack of process.

Sec. and Exch. Comm'n v. Ross, 504 F3d 1130, 1138-39 (9th Cir. 2007) (*quoting Mullane*, 339 U.S. at 314) (emphasis in the original).

It is the latter that this Petition is based on, namely improper service of process. Stallion contends that it was not, as the New York State Court of Appeals stated, for "the Paris Commercial Court to consider whether service on Stallion was properly made," Pet. App. 7a, but for the United States courts to make that determination, based on their own interpretation of the Hague Convention and the United States Central Authority regulations in furtherance therewith. Stallion contends that the Court of Appeals' finding that, "it would seem clear that it was 'established' to [the French court's] satisfaction that [the Hague Convention's] requirements were met," (Pet. App. 7a) constitutes undue, speculative deference to a foreign court over a United States defendant, and plain error.

I. RESPONDENT'S FAILURE TO EFFECT PROPER SERVICE UNDER THE HAGUE CONVENTION BY TRANSLATING THE FRENCH PLEADINGS INTO ENGLISH AS REQUIRED BY THE DEPARTMENT OF JUSTICE DEPRIVED THE FRENCH COURT OF PERSONAL JURISDICTION OVER STALLION

In the courts below, Stallion established that the United States requires English translation of litigation documents served in the United States under the Hague Convention. Specifically, and in response to the Hague Convention's Permanent Bureau's request to "specify the extent and scope of requirements for translation", DOJ stated plainly that:

> "all formal requests for the service of documents made pursuant to Article 5(1) . . .

must be translated into English, *along with a translation of the underlying documents.*" (emphasis supplied).

The DOJ went on to elaborate:

> We do not believe that requiring a translation of documents to be formally served is contrary to the spirit or letter of Article 5(3). Rather than making judicial assistance more cumbersome, we believe that it makes service easier to accomplish, and avoids unnecessary delays . . .
>
> * * *
>
> In addition, while the translation requirement for formal service imposed under Article 5 may create an additional burden on the requesting party, in many States, including the United States, it provides some degree of assurance that the recipient of the service of process is accorded full due process. *Where the documents have not been translated sufficiently to enable the recipient to obtain a general understanding of the nature of the proceeding, courts could find that adequate notice and an opportunity to defend themselves was not accorded the recipient of the service, and any subsequent judgment could become unenforceable.* For that reason, we believe that the translation requirement is fully consistent with the spirit of the convention, and the desire to ensure that fair and equitable justice is provided all litigants (emphasis supplied).

In interpreting a provision of the Hague Convention, this Court has held that "to ascertain the [ ] meaning of [a treaty] we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties." *Volkswagenwerk Aktiengesellschaft v. Schluck*, 486 U.S. 694, 700 (1988).

DOJ's response to the Hague Convention Questionnaire, its communiqué to the Organization of American States and the Department of State Circular Note are pronouncements made by United States government agencies charged with implementation and enforcement of the Hague Convention and are definitive regarding the application of the Convention in this country. *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1966) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight"); *El A. Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 172 (1999) ("The reasonable view of the Executive Branch concerning . . . an international treaty ordinarily merits respect.").

The Appellate Division, First Department's decision below acknowledged that other courts in the United States have recognized the authoritative nature of these official pronouncements regarding adoption of the translation requirement. Pet. App. 10a.

The United States is not alone in requiring translation of documents formally served under the Hague Convention. Twenty-nine other Hague

Convention Member States impose a similar translation requirement, including France as well as Canada, China, Germany, Ireland, Israel, Russia, Spain, Sweden and The United Kingdom.

DOJ's stated rationale for adopting the translation requirement is instructive in its embrace of the due process requirements enunciated in those decisions:

> [The translation requirement] provides some degree of assurance that the recipient of the service of process is accorded full due process. Where the documents have not been translated sufficiently to enable the recipient to obtain a general understanding of the nature of the proceeding, courts could find that adequate notice and an opportunity to defend themselves was not accorded the recipient of the service, and any subsequent judgment could become unenforceable. For that reason, we believe that the translation requirement is fully consistent with the spirit of the convention, and the desire to ensure that fair and equitable justice is provided all litigants.

Having established the mandatory nature of the translation requirement, it follows that foreign language documents which do not satisfy that requirement cannot serve as a basis for jurisdiction for failure to satisfy the Hague Convention and basic due process. As such, Stallion's purported "default" in the French proceeding was neither willful nor negligent as a matter of law, and it could not be faulted for failing to respond to papers

in a foreign language that were thrust into the hands of its support staff.

This reading of the Hague Convention translation requirement is consistent with a large body of decisional law in the United States. For instance, *Julien v. Larson*, 25 Cal. App.3d 325, 101 Cal. Rptr. 796 (1972) is directly on point. There, a foreign plaintiff sought to enforce a default judgment against a U.S.-based company issued by a Swiss court. Affirming a lower court's refusal to enforce the judgment, the California Court of Appeals held that plaintiff's failure to properly serve defendant with English translation of German documents deprived the Swiss court of personal jurisdiction over defendant. The *Julien* court held that "the Swiss court could acquire personal jurisdiction over defendant only by effective service of its process" and that "the process served must give defendant sufficient notice of the pending foreign proceeding to satisfy the requirements of due process of law." *Id*, 25 Cal. App.3d at 327-28, 101 Cal. Rptr. at 798. Specifically, the appellate court held that:

> [W]e think at a minimum a defendant should be informed in the language of the jurisdiction in which he is served (in California,[it is] English) that a legal action of a specific nature is pending against him at a particular time and place.

Id., 25 Cal. App.3d at 329, 101 Cal. Rptr. at 798.

Paradoxically, a French court would not enforce a default judgment issued against one of its citizens under these same facts and circumstances. France adheres to the same fundamental principle of due process embodied in the translation requirement, both as a matter of domestic and international law. Like the majority of other signatories to the Hague Convention, France requires translation of documents that are being formally served under Article 5. Moreover, under the French Code of Civil Procedure, the exclusive method of effecting proper service of process involves service of documents written in or translated into French by a French sworn (court-appointed) interpreter. *See* Herzog, Civil Procedure in France (Martinus Nijhoff, The Hague, The Netherlands 1967), at 594, *citing in part* Jurisclasseur De Droit International, Fasc.584, at Nos. 36-38 (1963).

Federal and State United States courts hold that the inverse is also true. In *Lasky v. Cont'l Prods. Corp.*, 97 F.R.D. 717 (E.D. Pa 1983), the court vacated a default judgment entered against a German company which was never served with process under the Hague Convention. The German authorities had rejected the original U.S. documents plaintiff had forwarded for service because these documents were not accompanied by the requisite translations into German. *Id.*, 97 F.R.D. at 719. The court held that "it is quite understandable that a foreign entity . . . would not understand that [it] had been served and [was] required to answer." *Id. See also Am. River Transp. Co. v. M/V Bow Lion*, 2004 WL 764181, at 2 (E.D. La. April 7, 2004) (Dismissing an action because of improper service of process where plaintiff "did not translate the pleadings into Korean pursuant to terms

of the Hague Convention"); *Teknekron Mgmt, Inc. v. Quante Fernmeldetechnik*, 115 F.R.D. 175 (D. Nev. 1987) (Holding service improper under the Hague Convention and granting defendant's motion to dismiss where the German Central Authority had accepted and delivered service papers which included an exhibit to the complaint that was not translated into German).

State court holdings on the issue are fully consistent. In *Ward v. Ludwig*, 778 N.E.2d 650 (Ohio App. 4th Dist., 2002), plaintiff served defendant, a German citizen, with a copy of the complaint he filed in the Ohio state court. The complaint was not translated into German, as required by Germany under the Hague Convention. Defendant failed to properly appear and a default judgment was eventually entered against her. Subsequently, defendant moved to vacate the default judgment, claiming that the Ohio court which issued the judgment lacked jurisdiction since defendant "was never properly served with the summons and complaint in compliance with the Hague Convention." *Id.*, 778 N.E.2d at 652. As in the case at bar, the plaintiff in *Ward* argued that, even if he had not properly served the defendant under the Hague Convention, the defendant had "received actual notice [of the action against her], understands the English language, and had a German lawyer file an answer to the complaint." *Id.*, 778 N.E.2d at 653. The appellate court disagreed:

> We do not think that a trial court should have to determine on a case-by-case basis whether a defendant and her foreign lawyer understand enough English language so that they can interpret legal documents. Here, we

> would have to guess whether [defendant] and her German lawyer understand English well enough to interpret the complaint and related papers . . . Consequently, actual notice of the complaint and related papers written in English language . . . is insufficient. *Id.*

See also In re Alyssa F., 6 Cal. Rep. 3d 1, 4 (Cal. App. Ct. 2003) ("Failure to properly serve a party who resides outside the country under the Hague Service Convention renders all subsequent proceedings void as to that person"); *Johnson v. Pfizer, Inc.*, 2002 WL 1041984, at 3 (Conn. Super. Ct. 2002) (Plaintiff's failure to translate the summons into Swedish warranted dismissal); *Honda Motor Co., Ltd. v. Superior Court*, 12 Cal. Rptr.2d 861 (Cal. App. Ct. 1993) (Granting Japanese corporation's motion to quash service of summons because, among other things, the service "papers were unaccompanied by any Japanese translation").

Johnson v. Pfizer, Inc., supra, is equally on point. There, as here, plaintiff attempted to effect service on a defendant located in Sweden through that country's Central Authority. Sweden, like the United States, imposes a translation requirement on documents being served under the Hague Convention. Plaintiff failed to translate the summons, even though he translated the complaint. The court granted defendant's motion to dismiss, finding that the purpose of the Hague Convention is, in part, "to assure that the defendants sued in foreign jurisdictions would receive actual notice of suit." *Johnson*, 2002 WL 1041984, at 3 (*citing Volkswagenwerk v. Schlunk*, 486 U.S. 694 (1988)

(quotations omitted). The court found that the translation requirement imposed by Sweden,

> . . . comports with that purpose [in] that the person or entity being sued receive a document describing the nature of the suit in his, her or its native language—nothing else would be fair. *Id.*

New York courts have decided this issue consistently, and have "uniformly held that service of process in violation of the [Hague] Convention, which is part of the supreme law of the land, will not be upheld." Comm. on Federal Courts of New York State Bar Assn., *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 73 (1989). For instance, in *Reynolds v. Koh*, 109 A.D.2d 97 (3d Dep't 1985), the court affirmed the lower court's dismissal for lack of jurisdiction where plaintiff attempted to effect service of process on a Japanese defendant by registered mail. The appellate court noted that Japan does not permit "methods of service other than those using" that country's Central Authority. 109 A.D.2d at 100. The court held that plaintiff's failure to properly effect service through Japan's Central Authority deprived the New York court of personal jurisdiction over defendant, even though defendant had voluntarily accepted the service documents at issue in that case. *Id.*; *see also Derso v. Volkswagen of Am., Inc.*, 159 A.D.2d 937(4th Dep't 1990) (holding that jurisdiction over a German company was not acquired via service that "did not comply with the procedural requirements of the Hague Service Convention").

Here, similarly, Respondent did not translate the service papers, and PFI, DOJ's designated process server, accepted and delivered the untranslated papers. The fact that PFI accepted and served untranslated documents does not override or negate the invalidity of the service. Process servers do not establish policy for the United States.[1]

The decisions cited above all stand for the proposition that a foreign defendant is deprived of basic due process when proper service is not made in conformance with the Hague Convention. Stallion, at the very least, is entitled to the same due process that our courts have afforded to foreign defendants under circumstances virtually identical to this case.

II. RESPONDENT'S FAILURE TO SERVE PROCESS SUFFICIENT TO ACCORD STALLION REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD DEPRIVED THE FRENCH COURT OF PERSONAL JURISDICTION, EVEN WHERE STALLION HAD CONTRACTUALLY AGREED TO FRENCH JURISDICTION

In reversing the motion court's ruling below that no evidence was presented regarding the translation requirement, the Appellate Division, First Department nonetheless failed to address the central issue of violation of Stallion's due process rights by defective service under the Hague Convention and upheld the

1. Even PFI confirmed that translation of documents it serves under the Hague Convention must be translated into English unless defendant accepts service voluntarily.

decision below on different grounds never previously raised by the parties or addressed by the lower court. Citing New York's CPLR § 5305(a)(3)[2], the appellate court held, in error, that Stallion's due process challenge to the French court's exercise of personal jurisdiction is precluded by the forum selection clause in Stallion's contract with Respondent, which provided that disputes under the contract "shall be submitted to the competent court" in France.[3] Pet. App. 11a. Stallion contends that the appellate court's construction of CPLR §5305(a)(3) and its application in this case run afoul of fundamental principles of constitutional due process.

As a threshold matter, exercise of personal jurisdiction is premised on the fundamental due process proposition that service of process must be sufficient to afford a defendant reasonable notice and opportunity to be heard. In this regard, this Court has repeatedly held that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

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2. CPLR § 5305(a)(3) provides that a foreign judgment shall not be refused recognition for lack of personal jurisdiction, "if defendant prior to commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved."

3. The forum selection clause in Stallion's contract contains no provision specifying the manner of service of process.

> the action and afford them an opportunity to present their objections.

Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478, 484 (1988) (*citing Mullane v. Centr. Hanover Bank & Trust Co.*, 339 U.S., 306 (1950)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

These basic constitutional principles are equally applicable under New York law. Indeed, the New York State Court of Appeals has held that service of process must be made "in a manner which, objectively viewed, is calculated to give a corporation fair notice" of the proceeding against it. *See Fashion Page v. Zurich Ins. Co.*, 50 N.Y.2d 265, 272 (1980). And, in its most recent pronouncement on the subject of recognition of foreign judgments, that Court has held that "the inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction [and] . . . is not otherwise repugnant to our notion of fairness." *Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78, 83 (2006).

This threshold requirements of notice and opportunity to be heard are so fundamental that, even where parties had agreed, ahead of time, to submit to the jurisdiction of a foreign tribunal and have appointed an agent for service of process for this purpose, this Court has held that "adequate and timely notice . . . is a prerequisite to a valid judgment" issued by the tribunal agreed-upon by the parties. *Nat'l Equip. Rental, Ltd.*, 375 U.S. at 318. Indeed, in the Second Circuit opinion

in the same case, that Court noted that enforcement of jurisdiction and forum selection clauses in contracts is "limited by due process considerations". *Nat'l Equip. Rental, Ltd. v. Reagin*, 338 F.2d 759, 761-62 (2d Cir. 1964).

The manner in which service was attempted here, viewed under any objective criteria, did not give Stallion adequate or "fair" notice of the French proceeding. The service papers were not translated into English and the process server simply "left" them with Stallion's clerical staff, who were not authorized to accept service. Nor does such remarkably careless manner of delivering important court documents comport with our notions of fairness. *See, e.g. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (Exercise of personal jurisdiction must comport with traditional notions of "fair play and substantial justice"). Stallion's employees or officers, having no knowledge of French, would have no way of determining from a French writ where and/or when to appear or the nature of the claims asserted.

This case is plainly distinguishable from *Dynamic Cassette Int'l, Ltd. v. Mike Lopez & Assoc.*, 923 F. Supp. 8 (E.D.N.Y. 1996), the only decision the Appellate Division cited in support of its finding that Stallion was precluded from raising a due process challenge to service of process by the forum selection clause in its contract. In *Dynamic Cassette*, the court found that "defendant . . . was served in the English action in accordance with Texas law" and only then proceeded to examine whether additional basis for exercise of personal jurisdiction were present in defendant's contract. *Id.*, 923 F. Supp. at 11. Here, by contrast, the

appellate court failed to consider the threshold issue of violation of Stallion's due process rights by defective Hague Convention service.

The New York State Court of Appeals' decision in this case, taken to its logical extreme, leads to an absurd result that any manner of service of process—whether or not it conforms to basic due process requirements of notice and opportunity to be heard—would be sufficient to confer personal jurisdiction over a defendant, as long as it had agreed that disputes would be submitted to a foreign tribunal. Such a result runs afoul of bedrock principles of due process and basic fairness.

In fact, the New York Appellate Division, First Department decision below effectively acknowledged the fundamental nature of "objections [to service] based on due process." Pet. App. 11a. Citing solely to *Burda Media, Inc. v. Viertel*, 417 F.3d 292 (2d Cir. 2005), the appellate court, however, speculated that service in this case was "unlikely to give rise" to such objections. *Id.* However, in *Burda Media*, unlike the present case, defendant's actual notice of the foreign proceeding against him was never in question. *Id.*, 417 F.3d at 299. The Second Circuit found that the defendant was precluded from raising jurisdictional objections by (a) overwhelming evidence of his willful disregard and evasion of plaintiff's efforts to effect proper service under the Hague Convention and (b) his ultimate acknowledgment, in writing, of the receipt of service papers. *See id.*, 417 F.3d at 295-297, 299, 302-303.

This is a far cry from the circumstances here, where service on Stallion was neither acknowledged nor

sufficient to provide it with reasonable notice of the French proceeding. Thus, constitutional principles of due process, comity and inherent fairness require that the French default judgment in question not be granted full faith and credit.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that Certiorari be granted. The Court may wish to consider summary reversal of the decision of the New York State Court of Appeals.

Respectfully submitted,

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APPENDIX A — OPINION OF THE STATE OF NEW YORK COURT OF APPEALS DECIDED JUNE 8, 2010

STATE OF NEW YORK COURT OF APPEALS

No. 93

John Galliano, S.A.,

Respondent,

v.

Stallion, Inc.,

Appellant.

OPINION

LIPPMAN, Chief Judge:

A court in Paris, France entered a money judgment in favor of John Galliano, S.A. (Galliano) against Stallion, Inc. (Stallion), and Galliano seeks to have that judgment recognized in New York. The Appellate Division, applying New York's Uniform Foreign Country Money-Judgments Recognition Act, codified at CPLR article 53, concluded that the French judgment should be recognized in New York (62 A.D.3d 415, 879 N.Y.S.2d 400 [1st Dept 2009]). We granted leave to appeal and now affirm.

Appendix A

The underlying dispute is a contractual one. In 1998, Stallion entered into a licensing agreement with Les Jardins D'Avron, a French company, concerning the use of the "John Galliano" trademark for the production and distribution of luxury fur items in the United States, and Galliano was later substituted for Les Jardins D'Avron as a party to the agreement. The agreement provides that it is governed by the laws of France, and the agreement's forum selection clause, entitled "Competent jurisdiction," further provides that "[a]ny dispute which may arise in connection with this Agreement . . . shall be submitted to the competent court for the district over which the Paris Court of Appeals has jurisdiction."

Disputes between Galliano and Stallion arose with respect to royalty payments Galliano alleged that Stallion owed it under the licensing agreement and expenses Galliano believed it was owed in connection with a fashion show. For its part, Stallion believed it was owed money for various goods it had delivered to Les Jardins D'Avron.

The parties were unable to resolve these ongoing disagreements, prompting Galliano in 2002 to sue Stallion in the Commercial Court in Paris. Three attempts to serve Stallion with the French equivalent of a summons and complaint were made under the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention) (*see Volkswagenwerk Aktiengesellschaft v Schlunk*, 486 U.S. 694 [1988]).

In each instance the documents were delivered to Stallion and a certificate of service completed. Stallion, however, did not appear in the French proceeding, and judgment amounting to "the exchange value in euro as of the date of payment of the amount of USD 178,810," plus specified interest, was entered in Galliano's favor in October 2004. Galliano commenced this proceeding three years later to enforce the judgment in New York.

Stallion argues that New York should not recognize the judgment of the French court against it because that court lacked personal jurisdiction over Stallion. Stallion asserts that the purported service under the Hague Convention was ineffective because the documents delivered to it were written in French and were not accompanied by an English translation. Absent proper service, the argument continues, Stallion cannot be said to have received effective notice of the proceeding in Paris, and a defendant's lack of notice of the foreign proceeding that resulted in a money judgment against it must result in non-recognition of that judgment in New York under CPLR article 53 (*see* CPLR 5304 [a] [2], [b] [2]).[1]

"New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts," and, in accordance with that tradition, the State adopted the Uniform Foreign

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1. Below, Stallion also relied on CPLR 2101 (b), an argument rejected by Supreme Court that Stallion has since abandoned.

Money-Judgments Recognition Act as CPLR article 53 (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003]). Article 53 "applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal" (CPLR 5302), and "a foreign country judgment is considered 'conclusive between the parties to the extent that it grants or denies recovery of a sum of money'" (*CIBC Mellon Trust Co.*, 100 NY2d at 221 [quoting CPLR 5303]).

Generally, a foreign money judgment is to be recognized in New York under article 53 unless a ground for non-recognition under CPLR 5304 is applicable. Grounds for non-recognition include a lack of personal jurisdiction over the defendant by the foreign court (*see* CPLR 5304 [a] [2]) and a defendant's failure to receive "notice of the proceedings in sufficient time to enable him to defend" (CPLR 5304 [b] [2]).

CPLR 5304's grounds for non-recognition of foreign money judgments must be read together with CPLR 5305, however, which provides that a "foreign country judgment shall not be refused recognition for lack of personal jurisdiction if . . . the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved" (CPLR 5305 [a] [3]). Plainly, as the Appellate Division rightly concluded (*see* 62 AD3d at 416), Stallion did just that when it entered into the licensing agreement given that agreement's forum selection clause.

Stallion urges, however, that the Appellate Division's reading of CPLR 5305 effectively negates the notice component of a court's proper exercise of personal jurisdiction over a defendant, and Stallion asserts that it did not receive adequate notice of the proceedings in Paris because the documents purportedly served on it pursuant to the Hague Convention were written in French, unaccompanied by an English translation.

Notice of a proceeding is, of course, a fundamental component of a court's proper exercise of personal jurisdiction over a party, and CPLR 5304 itself expressly recognizes a lack of notice as a ground for not recognizing a foreign money judgment in New York (*see* CPLR 5304 [b] [2]). We agree with Stallion that if recognition of a foreign money judgment were sought in New York and the defendant had received no meaningful notice of the foreign proceeding, that lack of notice would serve as a legitimate basis for not enforcing the judgment in our State, as the entry of such a judgment would not comport with our conception of personal jurisdiction or our notion of fairness. This, however, is not that case. The Appellate Division concluded that Stallion "received notice of the French action [and] its service by personal delivery is unlikely to give rise to any objections based on due process" (62 AD3d at 416). We agree.

We first note that, in seeking enforcement of a foreign money judgment in New York, "the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to

perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*CIBC Mellon Trust Co.*, 100 NY2d at 222). "[T]he inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law" (*Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 83 [2006]). "If the above criteria are met, and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding" (*id.*).

Those criteria are met here, and, on this record, the enforcement of the French judgment is not repugnant to our notion of fairness. Stallion was well aware of its ongoing disputes with Galliano, and it was also aware that, under the licensing agreement, those disputes, if litigated, would be adjudicated in accordance with French law by a court in France. Stallion was delivered court papers written in French, first by a U.S. Marshal, then subsequently on two occasions by process servers from Process Forwarding International (the entity selected by the Department of Justice to carry out service in the United States under the Hague Convention), all in an effort to notify it of the commencement of the French proceeding.

Stallion disputes that these service efforts complied with the Hague Convention because the papers written

in French were not accompanied by an English translation. However, as long as we do not find the procedure used to be fundamentally unfair, the propriety of the service under the Hague Convention was an issue for the court in France. Our inquiry now under CPLR article 53 is more circumscribed; we need only determine at this stage whether the recognition requirements of article 53 have been met.

Significantly for our purposes in applying article 53 in this case, before it could properly issue a judgment against Stallion in Stallion's absence, Article 15 of the Hague Convention required the Paris Commercial Court to consider whether service on Stallion was properly made or whether "the document was actually delivered to the defendant or to his residence by another method provided for by" the treaty (for example, service "voluntarily" accepted as contemplated by the second paragraph of Article 5)(Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, [1969] 20 U.S. T. 361, T.I.A.S. No. 6638). Moreover, in whatever form service takes, Article 15 further requires that it be "established" - again, before judgment may be entered in a foreign defendant's absence — that the service abroad was made "in sufficient time to enable the defendant to defend" itself in the proceeding (*id.*) (notably, language that is identical to that used by our Legislature in CPLR 5304 [b] [2]). Given that the Paris Commercial Court entered a judgment in Galliano's favor in Stallion's absence, it would seem clear that it was "established" to that court's satisfaction that Article 15's requirements were met.

On this record, we are satisfied that Stallion had notice of the proceeding in France "in sufficient time to enable [it] to defend" itself in that action (CPLR 5304 [b] [2]), and the Paris Commercial Court's exercise of personal jurisdiction over Stallion under these circumstances was not unfair. Moreover, as noted, in the licensing agreement Stallion agreed to submit any contractual disputes to the jurisdiction of the French courts prior to the commencement of the proceeding in Paris and, pursuant to CPLR 5305 (a) (3), the French judgment should not be refused recognition.

On this record, because the French court's money judgment in favor of Galliano does not run afoul of our conception of personal jurisdiction or our notion of fairness, well settled CPLR article 53 law compels the recognition and enforcement of the French judgment in New York.

The Appellate Division order, insofar as appealed from, should be affirmed, with costs.

Order, insofar as appealed from, affirmed, with costs. Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 8, 2010

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT DECIDED MAY 5, 2009

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

(2009 NY Slip Op 03612)

John Galliano, S.A.,

Plaintiff-Respondent,

v.

Stallion, Inc.,

Defendant-Appellant.

Decided on May 5, 2009
Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

May 5, 2009, Entered

Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered April 29, 2008, awarding plaintiff, on its motion for summary judgment in lieu of complaint, the aggregate sum of $ 601,284.52, including interest at 5% prior to October 7, 2004, and 9% thereafter, and order, same court and Justice, entered September 26, 2008, which denied defendant's motion to renew, unanimously modified, on the law and the facts, renewal granted, the

rate of interest after October 7, 2004 decreased to 5%, and otherwise affirmed, without costs.

The motion court should have granted renewal to consider the affidavit of Fran Cannara because the allegation that Cannara had accepted service of process voluntarily and told the process server she was authorized to accept service was only first raised in plaintiff's reply papers on its summary judgment motion (*see e.g. Welch v Scheinfeld*, 21 AD3d 802, 808 [2005]), and the court's rules did not permit defendant to submit a sur-reply.

Renewal should also have been granted in the interest of justice (*see generally Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460 [2007]) to consider the documents that defendant obtained from the Department of Justice via a Freedom of Information request. In its opposition to plaintiff's summary judgment motion, defendant submitted printouts from the web site of the Hague Conference on Private International Law. While the court's rejection of the printouts was not sua sponte, defendant may very well have been surprised by such rejection, as other courts have relied on the Hague web site (*see e.g. Casa de Cambio Delgado v Casa de Cambio Puebla, S.A. de C.V.*, 196 Misc 2d 1, 6 [2003]; *Saysavanh v Saysavanh*, 145 P3d 1166, 1170 [2006]).

Even after considering the materials defendant submitted on renewal, we conclude that summary judgment was properly granted to plaintiff. It is true

that CPLR 5304(a)(2) declares a foreign country judgment to be not conclusive if the foreign court never had personal jurisdiction over the defendant. However, CPLR 5305(a)(3) states that a foreign country judgment should not be refused recognition for lack of personal jurisdiction if "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." Prior to commencement of the French proceedings, defendant entered into a contract in which it agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction under CPLR 5305(a)(3) (*Dynamic Cassette Intl. Ltd. v Mike Lopez & Assoc.*, 923 F Supp 8, 11 [ED NY 1996]).

Defendant received notice of the French action; its service by personal delivery is unlikely to give rise to any objections based on due process (*see Burda Media, Inc. v Viertel*, 417 F3d 292, 303 [2d Cir 2005]).

Contrary to defendant's claim, New York's public policy favoring resolution of disputes on the merits does not preclude enforcement of a foreign default judgment (*see Westland Garden State Plaza, L.P. v Ezat, Inc.*, 25 AD3d 516 [2006]).

Normally, plaintiff would be entitled to interest at the New York rate of 9% from October 7, 2004, the date of the French judgment (*see e.g. Wells Fargo & Co. v Davis*, 105 NY 670 [1887]). However, in its papers, plaintiff requested interest at only 5% (the French rate)

from the date of the French judgment until the date of the New York award. Therefore, it waived its right to a higher interest rate for the period prior to that award (*see Goldbard v Empire State Mut. Ins. Co.*, 156 NYS2d 324, 329 [1956], *mod on other grounds* 164 NYS2d 294 [App Term 1957], *mod* 5 AD2d 230, 171 N.Y.S.2d 194 [1958]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 5, 2009

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY DATED FEBRUARY13, 2008

SUPREME COURT OF NEW YORK,
NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND, *Justice*

INDEX NO. 109292/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

JOHN GALLIANO, S.A.,

Plaintiff,

-against-

STALLION, INC.,

Defendant.

Cross-Motion: [X] No.

Upon the foregoing papers, it is ordered that: The plaintiff has moved, pursuant to CPLR 3213, for summary judgment in lieu of complaint to enforce a foreign judgment entered on default by a French Court

in Paris on October 7, 2004 against the defendant Stallion, Inc., a New York corporation. The judgment is in the amount of $ 335,297.81, plus interest.

Background

On or around February 25, 1998, Stallion entered into a licensing agreement with a company named Les Jardins D'Avron, a French company which has a principal place of business in Paris but also maintains an office in New York and, according to the defendant, transacts business in New York. The licensing agreement concerned the use of the "John Galliano" trademark for the production and distribution of luxury fur garments in the United States. It provided that Les Jardins would receive the rights to various trademarks in exchange for royalty payments in amounts specified in the agreement and payable in American dollars. The agreement was in English and, according to the defendant, all of the negotiations and correspondence both before and after the agreement was executed were in English. However, the agreement provided that it was to be governed by the laws of France and that any dispute which might arise in connection with the agreement should be submitted to a Paris court.

At some point, the plaintiff, a French company, assumed the obligations of Les Jardins with respect to the licensing agreement. Thereafter, a dispute arose in which plaintiff accused Stallion of failing to make all of the required royalty payments due under the licensing agreement and Stallion claimed that the plaintiff owed

money for various goods and merchandise that Stallion had delivered to Les Jardins. The plaintiff also claimed that Stallion owed it money for expenses related to a haute couture show. Sometime in 2002, the plaintiff commenced a lawsuit against Stallion arising from this dispute in the Commercial Court in Paris. Stallion, however, never appeared and, following a trial, the judgment which is the subject of this proceeding was entered on default on or about October 7, 2004. This proceeding was commenced three years later because the judgment has never been satisfied.

Discussion

To prevail on a motion for summary judgment in lieu of complaint, the plaintiff must establish that there are no triable issues of fact regarding its entitlement to the money sought. *See Popular Construction, Inc. v. Bhutta*, 208 AD2d 514 (2nd Dept.1994); *Neuman v. Otto*, 114 AD2d 791 (1st Dept.1985). Article 53 of the CPLR sets forth the substantive requirements which must be met before a foreign country money judgment will be recognized in New York. *See* CPLR 5303-5305. These provisions require that (1) the foreign court which issued the judgment had both personal jurisdiction over the judgment debtor and subject matter jurisdiction over the case, (2) the foreign court was an impartial tribunal utilizing procedures compatible with due process of law and (3) the enforcement of the foreign judgment would not be unfair, conducive to fraud or violate New York public policy. *See CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 100 NY2d 215, 222 (2003); *Lenchyshyn v. Pelko*

Elec., 281 AD2d 42, 46 (4th Dept 2001). Generally, if the foreign country money judgment satisfies these requirements, it is conclusive and should be recognized. *See* CPLR 5302, 5303, 5305(a).

The sole issue in this proceeding is whether the French court had personal jurisdiction over the defendant Stallion. In support of its motion, the plaintiff has submitted two affidavits from Veronique Proix, an attorney who represented the plaintiff in France. Ms. Proix asserts that the plaintiff's lawsuit in France was commenced by serving three writs upon the defendant's New York office and that such service was effected pursuant to the Hague Convention. *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters dated November 15, 1965, 20 UST 361, TIAS No. 6638 (1965). A French writ is the equivalent of a summons and complaint. According to Ms. Proix, the three writs were served upon the defendant by personal delivery at its New York office on, respectively, December 16, 2002, February 5, 2004 and March 16, 2004 and were all accepted by Stallion employees. Ms. Proix claims that the March 16, 2004 writ was the one upon which the French court rendered its judgment. The plaintiff also claims that it served Stallion with a copy of the judgment on February 9, 2005. Stallion has not submitted any affidavits or evidence which contradicts the affidavit of Ms. Proix or the process servers.

In opposing the plaintiff's motion, Stallion nevertheless contends that the plaintiff did not properly

serve the writs or the judgment and that this court, pursuant to CPLR 5304(a)(2), should therefore deny recognition of the French judgment. It first argues that service of the writs was improper under the Hague Convention because the writs were never translated into English. However, contrary to the defendant's contention, the Hague Convention does not require that documents served in the United States be translated into English. Article 5 of the Hague Convention provides that the "Central Authority" of the country where service is made shall effect service by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory. It goes on to provide that the Central Authority *may* require the document to be written in, or translated into, the official language or one of the official languages of the country where service is made. In this respect, the Central Authority designated by the United States is the Department of Justice. The defendant has not cited to any rule or regulation promulgated by the Department of Justice which requires that foreign judicial documents be translated into English prior to service within this country's borders. Nor has Stallion cited to any case law, and this court has found none, which holds that the United States requires foreign judicial documents served in the United States pursuant to the Hague Convention to be translated into English. Although Stallion refers to a website which states that service of documents in the United States pursuant to article 5 of the Hague Convention requires that the documents be translated into English, the website is of unknown origin and

Stallion does not offer any explanation as to why this court should give it the force of law. Indeed, as the plaintiff points out, the fact that the Central Authority accepted its papers and effected service is prima facie proof that the papers were in the proper form and that service was made in compliance with the Convention. *See Resource Trade Finance, Inc. v. PMI Alloys, LLC*, 2002 WL 1836818 * 4 (SDNY 2002)

As a second argument, Stallion relies on CPLR 2101(b), which requires that all papers served in New York be in English. However, this provision clearly requires a translation only when a foreign language document is filed with the court or introduced into evidence as an exhibit. *See Rosado v. Mercedes-Benz of North America*, 103 AD2d 395 (2nd Dept 1984). The plaintiff fulfilled this requirement when it served translated copies of the French judgment along with its motion papers. The CPLR does not otherwise even address the issue of whether a pleading in a foreign legal proceeding has to be translated into English prior to service upon a party located in New York. In any event, as already discussed, such service is governed by the Hague Convention.

Notwithstanding the defendant's protestations to the contrary, there is nothing unfair or inappropriate about the service of the French court documents herein without a translation. As already noted, the Licensing Agreement between the parties which forms the basis of the French lawsuit and judgment states that it was to be governed by the laws of France and that any

dispute which might arise in connection with the agreement should be submitted to a Paris court. Thus, Stallion had every reason to anticipate that, in the event of litigation between the parties, it would be subject to proceedings in a French court conducted in French. The fact that the Stallion employees who were served with the three writs may not have spoken French does not mean that Stallion was deprived of adequate notice that the French action had been filed. Rather, at best, it shows that Stallion received papers it did not immediately understand and choose simply to ignore them. This is not a basis for denying recognition of an otherwise valid foreign judgment.

Stallion's third argument is that the plaintiff served the writs improperly and in violation of CPLR 311 because it delivered them to employees of Stallion who were not authorized to accept service of legal documents. This argument is without merit. The plaintiff has submitted the affidavit of Maria Bass, who served the third writ upon Fran Cannara, a Stallion employee. According to Bass, Cannara not only accepted service of the writ voluntarily, but also represented that she was authorized to do so. Notably, neither Cannara nor any other Stallion employee has submitted an affidavit which contradicts Bass. The plaintiff has also submitted affidavits of service which assert that the judgment and copies of the other writs were served and accepted by Stallion employees. Stallion has not offered any affidavits or evidence which cast doubt on these assertions. By not refuting the plaintiff's evidence that its employees voluntarily accepted service, Stallion has

failed to raise any issue of fact regarding the propriety of service on these individuals. *See Fashion Page v. Zurich Ins. Co.*, 50 NY2d 265, 273-74 (1980); *Arvanitis v. Bankers Trust Company*, 286 AD2d 273, 273-74 (1st Dept. 2001); *Cambio Delgado v. Puebla*, 196 Misc 2d 1, 9 (Sup Ct. Queens Co 2003). Although Stallion contends that Cannara and the other employees who accepted the papers were not authorized to do so, the process server cannot be expected to know the defendant's internal practices. Since service was otherwise made in a manner calculated to give the defendant fair notice of the legal proceedings against it, the court is persuaded that service was properly made. *See Seward & Kissel v. Smith Wilson Co., Inc.*, 814 F Supp 370, 375 (SDNY 1993). *See also Carlin v. Crum & Forster Ins. Co.*, 170 AD2d 251 (1st Dept. 1991); *De Vore v. Osborne*, 78 AD2d 915, 916 (3rd Dept. 1980).

Since service was proper under the Hague Convention and the CPLR, Stallion has failed to show the existence of any of the grounds set forth in article 53 of the CPLR which supports the denial of recognition of the French judgment. Accordingly, the plaintiff's motion for summary judgment in lieu of complaint should be and is hereby granted.

Appendix C

Settle judgment.

ENTER

Dated: 2/13/08

s/ MGD
Marylin G. Diamond, J.S.C.

Check one: [X] FINAL DISPOSITION
[ ] NON-FINAL DISPOSITION

168

(2)

No. 10-93

Supreme Court, U.S.
FILED
AUG 16 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STALLION, INC.,

Petitioner,

v.

JOHN GALLIANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented a compelling reason for this Court to review the decision of the New York State Court of Appeals affirming each lower court's recognition of a judgment rendered against Petitioner in France where: (1) the decision below was based on the application of a New York state statute and does not implicate any important federal question; (2) the decision below does not conflict with any decision of this Court, state court of last resort or United States Circuit Court; (3) each court below unanimously found that service upon Petitioner of the French pleadings comported with due process and that Petitioner had actual notice of the French Proceedings; (4) Petitioner contractually agreed to litigate all disputes arising between Petitioner and Respondent in France under French law; (5) Petitioner ignored three separate instances of service of process over a fifteen-month period; and (6) Petitioner has never asked the agreed forum court in France to vacate the judgment against it.

STATEMENT PURSUANT TO RULE 29.6

Respondent, John Galliano, S.A., has no parent corporation. No publicly held company owns 10% or more of its stock.

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Arbitron, Inc. v. Marathon Media, LLC,
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Fox v. Regie Nationale des Usines Renault,
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PRELIMINARY STATEMENT

There is no compelling reason – indeed, there is no reason at all – to grant the Writ of *Certiorari*. The decision of the New York State Court of Appeals raises no federal question. Rather, the decision below was grounded almost entirely on well-settled New York common law principles, and on the New York Civil Practice Law and Rules (the "CPLR"). Neither does the decision below conflict with any decision of this Court, a state court of final resort, or any United States Circuit Court. Instead, the Petition cites decisions that do not remotely resemble the facts presented here; the closest it comes is the 1972 decision of an intermediate California appellate court not relied upon by any court since. The absence of other decisions treating service in the United States of foreign court papers makes clear that American companies doing business abroad will suffer no significant impairment if the Petition should be denied.

The Petition does not genuinely raise any question about the constitutional rights of U.S. companies doing business abroad. One need only look to the Petition to see that, far from raising any question of constitutional law, Petitioner would like this Court to police the Courts of France and to determine whether Respondent's three separate instances of service of French process upon Petitioner in New York "deprived *the French Court* of personal jurisdiction over [Petitioner]." (italics added) Petitioner had years to raise this question before the French Court, but failed to do so.

The Petition frames the two issues for this Court to review: (1) whether the New York State Court of Appeals properly applied New York's Uniform Recognition of Foreign Country Money Judgments Act; and (2) whether its factual determination that service comported with due process was correct. Neither of these issues justifies this Court's review. A petition for a Writ of *Certiorari* is rarely granted where, as here, the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 612, 116 S.Ct. 1589, 1617, 134 L.Ed.2d 809 (1996) (Dissenting Opinion, J. Ginsberg) (citing Supreme Court Rule 10); *N.L.R.B. v. Waterman S.S. Corp.*, 309 U.S. 206, 207, 60 S.Ct. 493, 495, 84 L.Ed. 704 (1940) ("We do not ordinarily grant *Certiorari* to review judgments based solely on questions of fact.").

Petitioner has not succeeded in locating a single decision in which a court has held that a U.S. defendant in a contractually-agreed foreign judicial forum is entitled to a full translation of the foreign complaint. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923) (Dissenting Opinion, J. Taft) explaining that:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Id.*

Simply put, Petitioner has singularly failed to carry its burden of demonstrating that there are

any compelling reasons for this Court to grant the Petition.

The Petition should be denied.

STATEMENT OF THE CASE

I. New York's Uniform Recognition of Foreign Country Money Judgments Act - Article 53 of New York's CPLR

Under New York's Uniform Recognition of Foreign Country Money Judgments Act, codified at CPLR Article 53 ("Article 53"), a foreign money judgment that is final, conclusive, and enforceable where rendered is generally to be recognized in New York unless an enumerated ground for non-recognition under CPLR 5304 exists. *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 222, 762 N.Y.S.2d 5 (N.Y. 2003) *cert den'd* 540 U.S. 948, 124 S.Ct. 399, 157 L.Ed.2d 279 (2003). CPLR 5304's grounds for non-recognition include a lack of personal jurisdiction over the defendant (CPLR 5304(a)(2)) and a defendant's failure to receive "notice of the proceedings in sufficient time to enable him to defend" (CPLR 5304(b)(2)). However, CPLR 5304's grounds for non-recognition must be read together with CPLR 5305(a)(3), which forecloses challenges to the foreign court's personal jurisdiction where, as here, "the defendant prior to commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved."

II. The Underlying Dispute

On January 23, 1998, Petitioner and Respondent's predecessor in interest, Les Jardins D'avron ("Les Jardins"), a French Company, entered into a licensing agreement (the "Agreement") pursuant to which Les Jardins agreed to license the "John Galliano" trademark to Petitioner. The Agreement and subsequent assignment of rights to Respondent John Galliano, S.A. ("Galliano"), also a French company, were executed in Paris, France.

The Agreement is governed by the laws of France. It provides for an exclusive forum in the courts of Paris, France, for any dispute arising out of the Agreement. Nothing in the Agreement requires translation of French pleadings into English.

In 2001, disputes arose between Galliano and Petitioner regarding royalties and other charges due to Galliano under the Agreement. On November 6, 2001, Galliano's Chicago-based counsel sent a letter to John Georgiades, Petitioner's president, notifying him, in English, that if Petitioner did not make payment of $187,500 in outstanding royalties by November 15, 2001, Galliano "[would] commence an action in the appropriate French Court . . ." Petitioner acknowledged that these discussions took place and failed.

III. Galliano is Served with French Process Three Times

In 2002, Galliano brought suit against Petitioner in the Paris Commercial Court. Petitioner was personally served at its offices on three separate occasions with French "writs," the French equivalent of a summons and complaint (the "French Writs"), first by the United States Marshal on behalf of the Department of Justice ("DOJ"), as Central Authority for the United States under the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"), and twice subsequently by private process servers contracted by the DOJ.[1] In connection with each writ, the Paris Court issued a "Demande/Request" ("Demande") to the DOJ that Petitioner be served in accordance with Article 5(2) of the Hague Convention. All three of the French Writs contain repeated references to "Stallion," "Galliano," "Les Jardin," and the "$187,500" figure Galliano demanded from Petitioner, and the stamp of "Pascal Robert, Hussier de Justice," so that it would not be difficult to discern the nature of the papers, even written in French, simply by reviewing them. In each case, the U.S. Central Authority completed and returned the required Certificate/Attestation documenting that service had been effected.

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[1] The French Court asked Galliano to supplement the first writ to add additional details of its claim. Accordingly, a second writ was prepared and served on Petitioner. It contained an arithmetical error as to the relief demanded, requiring service of a third writ, largely identical to the second but with the error corrected.

Petitioner has never denied being served with the French Writs, or accepting service thereof. Notwithstanding that fact, Petitioner ignored all three writs and allowed judgment in Paris to be entered in favor of Galliano.

IV. Petitioner is Served with the French Judgment

By Judgment, dated October 7, 2004 (the "French Judgment"), the Paris Commercial Court awarded damages to Galliano on most, but not all of its monetary claims.[2] Article 15 of the Hague Convention prohibits a signatory nation's court from entering judgment by default unless it is satisfied that the foreign defendant was served "in sufficient time to enable the defendant to respond." Affidavits submitted by both parties are in accord.[3]

[2] The French Judgment shows that the French Court examined Galliano's proofs before entering judgment and *sua sponte* struck one of Galliano's claims.

[3] The affidavit submitted by Galliano's French counsel says "the [French] Court unquestionably satisfied itself that [Petitioner] was served properly and in accordance with the applicable law, and that it had thereby acquired jurisdiction over [Petitioner], or it would not have entered judgment for Galliano." The French attorney who submitted an expert affidavit to the Trial Court on Petitioner's behalf agreed that a French judge "must be assured that a defendant has knowledge – through service – that he is a party to a case in a foreign country . . ." and has the "discretion to implement any action to verify the validity of service . . . to ensure the defendant is fully aware of the ongoing proceeding."

On or about December 16, 2004, the DOJ served the French Judgment, pursuant to the French court's request, on Petitioner through the Hague Convention "by delivery to the addressee, if he accepts it voluntarily (second paragraph of Article 5 [of the Hague Convention])." The Affidavits of Service contained in the record reflect that, on February 9, 2005, a process server named Maria Bass served a copy of the French Judgment on Petitioner, by "presenting to and leaving the same with" Petitioner's receptionist."[4]

Petitioner did nothing after being served with the French Judgment, even though French law affords Petitioner one year to seek to vacate a default judgment. Thus, on four separate occasions, Petitioner's employees accepted and ignored court documents served by professional process servers acting under the authority of the United States government.

V. The Trial Court Recognizes the French Judgment

The Trial Court granted Galliano's motion for summary judgment in lieu of complaint, concluding that the French Judgment met the substantive requirements for recognition under Article 53. *See* Trial Court Decision, Appendix C, at p. 15(a) (quoting Article 53).

The Trial Court also found that Petitioner's challenges to service lacked merit, finding that personal

[4] The Amended Affidavit of Service shows that the French Judgment was "voluntarily accepted" by Petitioner's employee Maria D'Este. All four instances of service took place at Petitioner's principal place of business.

delivery of the French Writs on three separate occasions to Petitioner's employees who do not deny receiving them or claim to have rejected service was service "made in a manner calculated to give the defendant fair notice of the legal proceedings against it." *Id.* at p. 20a. The Trial Court further found "nothing unfair or inappropriate" about personal service of the French Writs upon Petitioner in the language in which it agreed to litigate and noted that:

> Stallion had every reason to anticipate that in the event of litigation between the parties, it would be subject to proceedings in a French Court conducted in French. Appendix C, at pp. 19a-20a.

The Trial Court also considered and rejected Petitioner's claim that service was fatally defective under the Hague Convention because the French Writs were served in French. The Court correctly observed that Petitioner failed to cite "any rule or regulation promulgated by the [DOJ]" which "requires" that foreign judicial documents served in the United States pursuant to the Hague Convention to be translated into English. *Id.* at 17a. Petitioner subsequently moved for renewal based on documentation ostensibly obtained through a FOIA request, the same documentation it presented to the Appellate Division, Court of Appeals, and now to this Court. The Trial Court concluded that these documents also failed to establish a requirement under the Hague Convention or any United States statute, rule, regulation or treaty declaration, and were at best advisory opinions without the force of law.

No subsequent reviewing court has disagreed.

VI. The Appellate Division Affirms

In its Decision and Order, the Appellate Division of the New York State Supreme Court (the "Appellate Division") affirmed the Trial Court's recognition of the French Judgment based on its application of Article 53. The Appellate Division, like the Trial Court, concluded that the French Judgment met the substantive requirements for enforcement under Article 53, holding that Petitioner's service defenses were foreclosed by CPLR 5305(a)(3) and that, in any event, service upon Petitioner comported with due process. "Defendant received notice of the French action; its service by personal delivery is unlikely to give rise to any objections based on due process." Appellate Division Decision, Appendix B, at p. 11a. The Appellate Division also rejected Petitioner's argument that the United States required translation under the Hague Convention holding that "even after considering the [FOIA] materials defendant submitted on renewal," summary judgment was properly granted. *Id.* at p. 10a.

VII. The New York State Court of Appeals Affirms

The New York State Court of Appeals affirmed recognition of the French Judgment based on its application of Article 53 and its factual determination that service upon the Petitioner comported with due process. Acknowledging CPLR 5304's grounds for non-recognition, the Court of Appeals concluded that Petitioner's challenges to the French Judgment based on CPLR 5304(a)(2) were foreclosed because ". . . the defendant prior to commencement of the proceedings

had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." Court of Appeals Decision, Appendix A, at p. 4a (quoting CPLR 5305(a)(3)).

In light of Petitioner's agreement to litigate *all* disputes before the French Court, including service issues, the Court of Appeals, following its precedents, declined to engage in a "microscopic analysis" to determine if the French Court correctly assumed jurisdiction over the dispute between the parties. Appendix A, at p. 7a.[5] Rather, it limited its inquiry to whether the French Judgment comported with New York's notions of due process. Court of Appeals Decision, Appendix A, at p. 7a.

The Court of Appeals agreed with the factual findings below, holding that Petitioner "received notice of the French action," and that the method by which it was served was "unlikely to give rise to any objections based on due process."

Accordingly, the Court of Appeals affirmed, concluding that:

> On this record, the enforcement of the French judgment is not repugnant to our notion of

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[5] The Court of Appeals properly noted that before rendering the default judgment the French Court satisfied itself that service was proper. Appendix A, at p. 6a ("for our purposes in applying Article 53 in this case, before it could properly issue a judgment against Petitioner in Petitioner's absence . . . it would seem clear that it was "established" to that court's satisfaction that Article 15's requirements were met.").

> fairness. Petitioner was well aware of its ongoing disputes with Galliano, and it was also aware that, under the licensing agreement, those disputes, if litigated, would be adjudicated in accordance with French law by a court in France.

Id. at p. 6a.

REASONS FOR DENYING THE PETITION

The Court of Appeals decision was based on its application of Article 53, a state statute, the constitutionality of which has never been challenged, and its factual determination, based on the record, that service comported with due process. The decision does not implicate an important federal question that has not been resolved by this Court, nor does it conflict with a decision of this Court, any Circuit Court or any other state court of last resort. It does not interpret a federal treaty. Accordingly, Petitioner has not carried its burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

Petitioner states only two "Reasons for Granting the Petition," and they are both different formulations of the same argument: Respondent's ostensible "failure to effect proper service under the Hague Convention" and its "failure to serve process sufficient to accord Stallion reasonable notice and opportunity to be heard" – in each case, by failing to serve English translations of the French Writs – "deprived the French Court of personal jurisdiction over Stallion."

In its travels through the New York State court system, Petitioner was unable to persuade a single judge of the proposition that there was anything unfair about the manner in which Petitioner was served on three separate occasions. Nothing about its successive losses below entitles Petitioner to the extraordinary relief it now seeks.

I. The Court of Appeals Decision Was Proper and Consistent with The Authority of This Court, the Circuit Courts and Other State Courts of Last Resort

The Court of Appeals' recognition of the French Judgment was based on its proper application of the CPLR, in accordance with Article 53's plain terms, its purpose and well-settled New York precedent. By its Petition, Petitioner does not challenge the constitutionality of Article 53, and it did not do so below.

Article 53 was enacted to "promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." *CIBC Mellon Trust Co.*, 100 N.Y.2d at 221, 762 N.Y.S.2d 5. In accordance with its purpose, Article 53 is "liberally construed by New York courts in favor of recognition and enforcement." *Koehler v. Bank of Bermuda Limited*, No. M18-302(CSH), 2004 WL 444101 at p. * 9 (S.D.N.Y. March 10, 2004); *Sung Hwan v. Rite Aid Corp.*, 7 N.Y.3d 78, 850 N.E. 2d 647, 817 N.Y.S.2d 600 (2006). Under Article 53, a money judgment issued by a foreign court will generally be recognized and enforceable in New York, unless it fits within one of the specifically enumerated

exceptions set forth in CPLR 5304(a) and 5304(b). *CIBC Mellon*, 100 N.Y.2d at 221-222, 762 N.Y.S.2d at 9. Grounds for non-recognition include: (a) a lack of personal jurisdiction over the defendant by the foreign court (CPLR 5304(a)(2)); and (b) defendant's failure to receive notice of the proceedings in sufficient time to enable him to defend himself (CPLR 5304(b)(2)).

However, CPLR 5304(a)(2)'s provision for non-recognition on personal jurisdiction grounds does not apply, pursuant to CPLR 5305(a)(3), where, as here, "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." CPLR 5305(a)(3). As above, Petitioner expressly agreed to the application of French law and the exclusive forum of the Courts of Paris, France, and any challenge to its acquisition of jurisdiction over Petitioner was properly directed to the agreed forum court in France, not to the U.S. courts years after judgment was entered in France.

Petitioner argues that the French Court did not have personal jurisdiction over Petitioner because service in New York of writs written in French did not comply with the Hague Convention. Relying on CPLR 5304(a)(2), Petitioner argued that the French Judgment must be refused recognition because the French Court lacked personal jurisdiction.

There are several glaring flaws with this argument. First, as the Court of Appeals properly noted, Petitioner's objection to service "was an issue for the court in France," the contractually-agreed forum for

resolution of all disputes between the parties. *See* Court of Appeals Decision, Appendix A, p. 7a. Affiants on both sides agreed that the French Court was required to review the question of service before it could render a judgment, as does the text of the Hague Convention itself. The New York State Court of Appeals determination was in keeping with its standing refusal to engage in a "microscopic analysis" of the judgment of a foreign court. *Sung Hwan Co. Ltd., supra; See also Koehler, supra*, 2004 WL 444101, at p. *15 (citing *CIBC Mellon, supra*) (holding that defendant who is given ample notice and opportunity to present a defense but who elects to forgo these opportunities, is precluded from contesting recognition of foreign country judgment based on technical challenges to service). The French Court system has been widely recognized for its fairness and respect for due process.

Second, every court below that has examined the question has come to the unanimous conclusion that "Stallion 'received notice of the French action [and] its service by personal delivery is unlikely to give rise to any objections based on due process.'" Court of Appeals Decision, Appendix A, 5a (quoting Appellate Division Decision, Appendix B, 11a). To this day, Petitioner has still provided no factual evidence to the contrary; the affidavits of its receptionists do not assert that service was never effected or that they refused to accept it, and the affidavit of Petitioner's principal does not assert that Petitioner did not know that Galliano had brought suit in France.

Finally, as discussed in more detail below, neither the Hague Convention nor United States law requires

that foreign judicial papers served in the United States be translated into English. Neither the plain language of the treaty nor any governing statute, regulation or treaty declaration requires that foreign litigants translate foreign court papers into English. No United States court has read such a requirement into the Hague Convention.[6] And no court has found anything unfair about serving a defendant which has agreed to litigate in France, as Petitioner did, with Court papers written in the language of the agreed forum. Not only is there no constitutional issue at stake here, the Courts below were clearly correct.

II. Service Upon Petitioner Comported With Due Process

Petitioner's due process arguments also fail to establish that it is entitled to this Court's review. Petitioner claims that service of the French Writs

[6] With one inapplicable exception, *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal.Rptr. 796 (Cal. 1972), the cases cited by Petitioner are all from United States courts determining that they did not acquire jurisdiction over a foreign defendant when the foreign defendant was served defectively abroad. Just as the United States courts were able to determine their own jurisdiction, so too was it for the French forum court to decide whether service on Petitioner caused it to acquire personal jurisdiction over Petitioner. And *Julen*, the decision of an intermediate California state court, which has not been relied upon by any other court, expressly does not hold that the Swiss papers served on a California defendant must be translated into English, even in the absence of a forum selection clause. Unlike the instant case, Larson denied knowing that he had been sued in Switzerland.

violated its due process rights because: (1) service of the French Writs failed to comply with the Hague Convention; and (2) service of pleadings that are not translated *per se* violates due process. Each of the courts below conducted a due process analysis and found Petitioner's arguments unavailing. Petitioner has presented no evidence to this Court to warrant a different finding.

The Trial Court found that personal delivery of the French Writs on three separate occasions to Petitioner's employees who did not deny receiving them or claim to have rejected service was "service . . . made in a manner calculated to give the defendant fair notice of the legal proceedings against it . . ." Appendix C, at p. 20a. The Trial Court found "nothing unfair or inappropriate about service of the French Court documents," upon Petitioner in the language in which it had chosen to litigate, noting that:

> [Petitioner] had every reason to anticipate that, in the event of litigation between the parties, it would be subject to proceedings in a French court conducted in French. Appendix C, 18a-19a.

The facts presented by Petitioner do not show it received inadequate notice. Rather, they "show that [Petitioner] received papers it did not immediately understand and chose simply to ignore them." *Id.* at 19a.

Petitioner had a great deal of time in which to change its mind, but failed to.[7]

Like the court below, the Appellate Division unanimously concluded that: "Defendant received notice of the French action [and that] its service by personal delivery is unlikely to give rise to any objection based on due process." Appendix B, at 11a. The Appellate Division found that Petitioner was much like the defendant in *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005), who was personally served with foreign court pleadings, had actual notice of the foreign proceedings and made the tactical decision to ignore them.

The New York State Court of Appeals also reviewed the record and unanimously concluded that service comported with due process, explaining that:

> On this record, the enforcement of the French judgment is not repugnant to our notion of fairness. Petitioner was well aware of its ongoing disputes with Galliano, and it was also

[7] In the courts below, Petitioner did not rely on CPLR 5304(b)(2), and with good reason. That provision clearly addresses temporal concerns relating to events within the litigation, making reference to an insufficient period of time to respond. Michigan's highest Court has reviewed various state cases on the issue and, in interpreting identical statutory language, concluded that CPLR 5304(b)(2)'s language about "notice of the proceedings" is temporal and refers to "notice of particular relevant action taken within the case" as opposed to the case "as a whole." *See Isack v. Isack*, 274 Mich.App. 259, 733 N.W.2d 85 (2007).

> aware that, under the licensing agreement, those disputes, if litigated, would be adjudicated in accordance with French law by a court in France. Petitioner was delivered court papers written in French, first by a U.S. Marshal, then subsequently on two occasions by process servers from Process Forwarding International (the entity selected by the Department of Justice to carry out service in the United States under the Hague Convention), all in an effort to notify it of the commencement of the French proceeding. *Id.* at 6a.

Due process requires notice that is reasonably calculated to apprise a party of the pendency of a lawsuit and to afford that party the opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). It does not, as Petitioner argues, require pinpoint compliance with applicable service rules. *See, e.g., Koehler, supara,* 2004 WL 444101, at p.*15. Thus, service that provides the notice contemplated by *Mullane* but does not strictly comply with the Hague Convention still affords due process. *See, e.g., Burda Media, Inc.*, 417 F.3d at 302; *Koehler, supra,* 2004 WL 444101, at p.* 15; *Overseas Food Trading, Ltd. v. Agro Aceitunera S.A.*, No. 06-800, 2007 WL 77337 at * 3 (D.N.J. Jan. 8, 2007) (strict compliance with Hague Convention unnecessary where defendant received

actual notice and plaintiff made good faith effort to serve in accordance with Hague Convention).[8]

Moreover, where, as here, there is no dispute that the defendant actually received the pleadings, service is generally deemed proper under traditional notions of due process, even if governed by the Hague Convention. *See Burda Media, Inc., supra*; *In Re South African Apartheid Litigation*, 643 F. Supp.2d 423, 432 (S.D.N.Y. 2009); *Resource Trade Finance, Inc. v. PMI Alloys, LLC*, No. 99 civ 5156, 2002 WL 1836818, at p. *4 (S.D.N.Y. August 12, 2002); *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 397, 548 N.Y.S.2d 728, 732-33 (N.Y. App. Div., 2d Dept. 1989); *Greene v. Le Dorze*, No. CA 3-96-CV-590-R, 1998 WL 158632, at *4 (N.D.Tex. Mar.24, 1998) (failure to comply strictly with Hague Convention is *not* automatically fatal to effective service) (emphasis in original); *Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D.Tenn.1984) (same); *Overseas Food Trading, Ltd., supra.*

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[8] As the circuit courts have noted, and the lower courts' decisions demonstrate, "whether a particular method of notice is reasonable depends on the particular [factual] circumstances." *Matter of Faden*, 96 F.3d 792, 796 (5th Cir. 1996) (quoting *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 484, 108 S.Ct. 1340, 1344 (1988). Those factual findings should not be disturbed on review unless they are "clearly erroneous." *See, e.g., Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527 (1986) (Facts necessary to proper determination of legal question should be reviewed by courts of appeals pursuant to "clearly erroneous" standard of review). Petitioner does not argue that the lower courts' factual findings were "clearly erroneous."

Applying these principles to the case at bar, it is clear that Petitioner has no legitimate challenge to the lower courts' factual finding that service complied with due process notwithstanding service of the writs in French. Petitioner does not claim that it did not know that a French Proceeding had been instituted against it. Petitioner does not claim that none of its employees speak French or that it could not have easily ascertained that the three French Writs were the lawsuits Galliano previously had threatened (in English). All the French Writs prominently contained the words "Galliano" and "Stallion", along with references to $187,500, the precise figure demanded in the English language letter of Galliano's attorneys.

The record also shows that on four separate occasions, a process server, one of whom was a uniformed United States Marshal, visited Petitioner's principal place of business and handed French legal papers – the French Writs and French Judgment – to three different employees of Petitioner, none of whom denies receiving them. Petitioner's principal also does not deny knowing that Galliano had commenced suit in France.

Ignoring these undisputed facts, Petitioner argues that it is necessarily a due process violation for an American entity to be served foreign legal documents written in the language of the contractually-agreed foreign court. No Court has ever adopted so expansive and radical a rule. To the contrary, courts have routinely upheld service of documents written in a language not understood by its recipients where the attendant circumstances trigger a "duty of further inquiry."

Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983) *cert den'd* 466 U.S. 929, 104 S.Ct. 1713 (1984) (service of notice from Department of Health and Human Services regarding plaintiff's eligibility for certain benefits does not violate due process where Spanish-speaking plaintiff does not speak English, the language in which the notices were served) (citing *Commonwealth v. Oliva*, 369 Mass. 62, 69, 337 N.E.2d 904, 909 (Mass. 1975) (service of documents constitutes "actual notice" even though Spanish speaking plaintiff did not understand English, the language in which documents were served, because service triggered a "duty of further inquiry" as to nature of documents served)); *Tahan v. Hodgson*, 662 F.2d 862, 865 (D.C. Cir. 1981) (recognizing judgment obtained in Israel even though defendant had been served in Israel in Hebrew, concluding that "[e]ven if the defendant were unable to read Hebrew, he should have surmised that the papers being served upon him were legal in nature, and that he could ignore them only at his peril.").

The lower courts said the same of Petitioner. Petitioner was engaged in an ongoing dispute with Galliano governed by a contract requiring resolution of the dispute in France. No reasonable construction of the largely undisputed facts supports an argument that Petitioner did not receive actual and timely notice of the filing of suit in France. Petitioner's efforts to distinguish this case from *Burda*, *supra*, the precedent relied upon by the Appellate Division, miss the mark. In *Burda*, the Second Circuit held that due process concerns were alleviated by "service of process by personal delivery through the French authorities." 417 F3d at 303. The Court in *Burda* was concerned with actual notice. *Id.* Petitioner still does not deny actual

notice of the commencement of suit in France, and both the Appellate Division and the New York State Court of Appeals found no reason to question Petitioner's actual notice. The Petition provides no cogent reason to overturn these unanimous rulings.

III. The United States Does Not Require Translation of Documents Served Under the Hague Convention

On its face, the Hague Convention never requires service of translated documents. The purpose of the Hague Convention is to facilitate service of process abroad by simplifying and expediting the procedures for such service, and to assure defendants of adequate notice that a foreign proceeding has commenced. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-703, 108 S. Ct. 2104, 2108-2110 (1988). In furtherance of this purpose, each signatory nation is required to designate a Central Authority to serve judicial documents requested by a signatory's courts. In the United States, the DOJ is the Central Authority, and it delegated process-serving responsibilities first to the United States Marshal's Service and subsequently to a private process serving firm.

Far from dictating the specific methods by which international service must be effected, Article 5 of the Hague Convention allows service in the following three ways:

> (a) by a method prescribed by its internal laws for the service of documents in domestic actions upon persons who are within its territory, or

> (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed,
>
> Subject to paragraph (b) of the first paragraph of this article, documents may always be served by delivery to an addressee who accepts it voluntarily (also known as "informal service" or "voluntary acceptance").

R. 175. *See* 20 U.S.T. 361 (1969).

Article 5 of the Hague Convention specifically addresses translation of documents only as follows:

> If the document is to be served *under the first paragraph above*, the Central Authority *may* require the document to be written in, or translated into, the official languages of the State addressed.

Id. (emphasis added).[9] The discretionary "may" in the translation provision of Article 5 does not require translation unless the Hague Convention signatory expressly requires it. *See, e.g., Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1389 (8th Cir. 1995); *Zelasko v. Comerio*, No. 08-366-MJR, 2008 WL 2755463 at p. * 2

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[9] The reference to the "first paragraph above" is to subparagraphs (a) and (b) of Article 5. The paragraph beneath those provisions is commonly referred to as the "second paragraph" of Article 5.

(S.D. Ill. July 14, 2008); *Vazquez*, 152 A.D.2d at 397, 548 N.Y.S.2d at 732-33.

A. Translation is Never Required Where Service is Made Through Article 5(2) of the Hague Convention

Translation of documents served under the second paragraph of Article 5 of the Hague Convention is never required. *See Vazquez, supra*, 152 A.D.2d at 397, 548 N.Y.S.2d at 732-33 ("[T]he convention provides no right to require translation of a document where service is made by the Central Authority by a particular method requested by the applicant pursuant to article 5(b). . . .") (internal quotations and citations omitted). Petitioner does not dispute this.

The second paragraph of Article 5 of the Hague Convention permits service upon an addressee who "voluntarily accepts" the papers as long as such method is compatible with the law of the State addressed. Here, service was indisputably requested pursuant to Article 5(2) and the courts below found that the facts established that Petitioner's receptionists voluntarily accepted service of the papers. *See* Decision of the Trial Court, Appendix C, at p. 19a; Appellate Division Decision, Appendix B, at p. 10a. This finding was in accord with well-settled New York statutory precedent. In fact, Petitioner adduced no evidence whatsoever that its employees refused to accept service. *See Greenfield v. Suzuki Motor Co., Ltd.*, 776 F. Supp. 698 (E.D.N.Y. 1991) where the Court found that, as here, "there was not any rejection of service by defendant to indicate that service was not voluntarily." *See also Arbitron, Inc. v. Marathon*

Media, LLC, No. 07 Civ.2099, 2008 WL 892366, at p. * 3 (S.D.N.Y. Apr. 1, 2008); *Eastman Kodak Co. v. Miller & Miller Consulting Actuaries, Inc.*, 195 A.D.2d 591, 592, 601 N.Y.S.2d 10 (N.Y. App. Div., 2d Dept. 1993); *Psathas v. Catskill Regional Off-Track Betting Corporation*, 173 A.D.2d 1070, 1071, 570 N.Y.S.2d 407, 408 (N.Y. App. Div., 3d Dept. 1991).

Petitioner asks this Court to determine that translation is required where documents are served under the first paragraph of Article 5(1). There is no need to reach this issue given the clear evidence that service was effectuated upon Petitioner through the second paragraph of Article 5 of the Hague Convention where, undisputedly, translation may never be required.[10]

B. The United States Does Not Require Translations of Pleadings Served Through Article 5(1) of the Hague Convention

The United States does not require translation even when service is made through Article 5(1) of the Hague Convention. Service, as described in the affidavits of the process servers, also satisfies the requirements of Article 5(1).

As above, Article 5(1) merely authorizes a treaty signatory to require translation. It contains no treaty obligation to translate. Where the Hague Convention

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[10] The claim that the French pleadings were "thrust" in the hands of its "support staff" is not supported in the Record, and is made for the first time in the Petition.

gives signatories the authority to opt out of a treaty obligation, or to impose a local requirement, these decisions will be evidenced in the signatory's official Declarations in the Record ("an Official Declaration") appended to the Hague Convention. *See, e.g.*, *Ackerman v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) (whether plaintiff violated F.R.C.P. 4 by effectuating service by mail was irrelevant since "the United States has made no declaration or limitation to its ratification of the Convention regarding Federal Rule 4"). Signatories wishing to make clear that they require translation of documents served under the first paragraph of Article 5 do so by publishing an Official Declaration, which becomes part of the treaty itself. Although the United States has issued Official Declarations to the Hague Convention on other topics, the treaty contains no Official Declaration by the United States requiring translation.[11]

Recognizing this, and the equal lack of a statute or DOJ regulation requiring translation, Petitioner seeks to cobble together a United States translation requirement from documents it claims to have obtained

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[11] Other signatories to the Hague Convention express their decision to require translated documents in this way. For example, Germany ("Formal service [Paragraph 1 of Article 5 of the Convention] shall be permissible only if the document to be served is written in, or translated into the German language") and Sweden ("By virtue of the third paragraph of Article 5 of the Convention, the Central Authority requires that any document to be served under the first paragraph of the same article must be written in or translated into Swedish.") have both issued Official Declarations making clear their translation requirements.

primarily through a FOIA request. Among these are (a) an unofficial response by a DOJ employee to a questionnaire from the Hague Convention treating a wide variety of issues (posted on a website of the Hague Convention), (b) two letters from a DOJ official to third parties, and (c) an unsigned "Circular Note" from Secretary of State Colin Powell's office to the "chiefs of the mission in the United States."

Merely examining these documents should be sufficient to demonstrate that none of them remotely have the force of law. Every court below has rejected Petitioner's attempt to impute to them any persuasive value at all. None purports to be an official act or pronouncement of the United States, let alone a rule, regulation or statute that would carry the weight of law. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1663 (2000) (opinion letters from agency officials do not amount to law or rule making). No foreign litigant, deciding how to seek service of a foreign court document on a United States party, would ever make a FOIA request to discern U.S. law on translation, and even if a litigant was to find Petitioner's FOIA documents, the litigant would not conclude that any of Petitioner's documents are authoritative. The litigant would look to the text of the Hague Convention itself and the Official Declarations of the United States, as its signatories intended, and would find no United States translation requirement.

The cases cited by Petitioner for the proposition that English translation is required under the Hague Convention all involve service of United States court papers in nations that have made a formal declaration

that translation is required. *See, e.g., Johnson v. Pfizer, Inc.*, No. 990118821, 2002 WL 1041984 at *1, 4 (Conn. Super. Ct. April 26, 2002) (service of English language papers in Sweden improper where Sweden's declaration on Hague Convention requires translation into Swedish); *Ward v. Ludwig*, 149 Ohio App. 3d 687, 778 N.E.2d 650 (Ohio App., 4th Dist. 2002) (service of English language papers in Germany improper where Germany's declaration on the Hague Convention requires translation into German); *Lasky v. Cont'l Prods. Corp.*, 97 F.R.D. 717 (E.D.Pa 1983) (service of English language papers in Germany improper where Germany's declaration on the Hague Convention requires translation into German). These cases are all wholly inapposite to the facts presented here.[12] Petitioner has not cited a single decision interpreting the Hague Convention or the United States Official Declarations thereto to require that service of foreign court documents in the United States, especially on a United States party who has contractually agreed to litigate abroad, must be accompanied by an English translation.

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[12] So too is Petitioner's claim, made for the first time in the Petition, that the doctrine of comity precludes recognition of the French Judgment because France requires translation. Frances translation requirement – expressed in an Official Declaration to the Hague Convention – is irrelevant to the question of what the United States requires.

CONCLUSION

Petitioner has not provided a single compelling reason for this Court to grant its Petition for a Writ of *Certiorari*. Accordingly, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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